Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Stale or Moot Docketed Proceedings	)	
	)	
1993 Annual Access Tariff Filings Phase I	)	CC Docket No. 93-193
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464 Phase II	)	CC Docket No. 93-193
	)	
Bell Atlantic Telephone Companies Tariff F.C.C. No.1, Transmittal No. 690	)	CC Docket No. 94-157
	)	
NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328	)	

REPLY COMMENTS OF SBC COMMUNICATIONS, INC. IN SUPPORT OF VERIZON'S PETITION FOR RECONSIDERATION

SBC Communications, Inc. (SBC), on behalf of Ameritech Illinois d/b/a SBC Illinois, Ameritech Indiana d/b/a SBC Indiana, Ameritech Michigan d/b/a SBC Michigan, Ameritech Ohio d/b/a SBC Ohio, Ameritech Wisconsin d/b/a SBC Wisconsin, Nevada Bell Telephone Company d/b/a SBC Nevada, Pacific Bell Telephone Company d/b/a SBC California, and Southwestern Bell Telephone L.P., SBC Southwest ("SBC LECs"), hereby submits this Reply in response to AT&T and WorldCom's Opposition to Verizon's Petition for Reconsideration.[1] As SBC demonstrates herein, contrary to AT&T and WorldCom's assertions, the Commission did not have authority to reinstate Docket 94-157. Termination of Docket 94-157 was not an error,

[1] Verizon Petition for Reconsideration (filed March 27, 2003).

and even if it was, it was not clerical in nature, but substantive. The Commission therefore could only correct the *Termination Order* via timely reconsideration of the order on its own motion or through a timely petition for reconsideration filed by an aggrieved party. Neither was done here. Further, no party appealed the *Termination Order* pursuant to Section 402 of the Act. The *Termination Order* is thus a final, non-appealable order and the Bureau was procedurally barred from reinstating Docket 94-157.

AT&T and WorldCom argue that the Commission's termination of Docket 94-157 in December 2001 was an inadvertent error. Specifically, they claim that in the *Termination Order*, the Commission explicitly described the terminated proceedings as proceedings that were resolved by final orders. Docket 94-157 was never resolved by a final order, thus, according to these commenters, the Commission had unfettered authority to correct the mistake, and appropriately did so in the *Reinstatement Notice*.

It is not at all clear, however, that the Commission's inclusion of Docket 94-157 in the *Termination Order* was, in fact, an error. While it is true that the *Termination Order* describes the terminated proceedings as those having been resolved by the issuance of final orders, the *Termination Order* indicates that the Commission also may have intended to terminate proceedings it deemed "stale." Indeed the order is titled, "In the Matter of Termination of *Stale* or Moot Docketed Proceedings (emphasis added)."

That the termination of Docket 94-157 was not unintended is further indicated by the fact that the Commission issued an *Erratum* two months after the *Termination Order* reinstating two of the proceedings terminated therein.[2] Docket 94-157 is not mentioned in that *Erratum*. SBC would be surprised, indeed, if the Commission had issued this *Erratum* without taking a second look at *all* of the dockets terminated in the *Termination Order*. Certainly, one would think that the improper inclusion of the two dockets would have raised a red flag that would have precipitated such a review. The fact that the Commission did not see fit to reconsider its

[2] *Termination of Stale or Moot Docketed Proceedings, Erratum*, 17 FCC Rcd 4543 (Com. Car. Bur. 2002) (*Erratum*).

termination of Docket 94-157, particularly when coupled with the caption of the *Termination Order*, suggests to SBC that the inclusion of Docket 94-157 in the list of terminated dockets may not have been inadvertent and that it could be the descriptive text of the *Termination Order*, which described the list of proceedings terminated in overly narrow terms, that was the error.

In any event, even if the termination of Docket 94-157 was an error, it was not the type of error that the Commission may correct after the deadline for reconsideration has expired. When the reconsideration period has expired, the Commission may correct only "*inadvertent ministerial errors,"* not all inadvertent errors, as AT&T and WorldCom suggest. A ministerial error is a "clerical mistake," and it is distinguished under Rule 60 of the Federal Rules of Civil Procedure from other types of "mistake," "inadvertence," or "excusable neglect."[3] If the Commission, indeed, made a mistake in terminating Docket 94-157, it was not a "clerical" mistake. No one at the Commission transposed digits or committed some other type of "amanuensis mistake."[4] Rather, if a mistake was made, it was a *substantive* mistake. Perhaps that mistake was the result of confusion as to the purpose of the *Termination Order*, which, as noted, seems to point in two different directions. Perhaps staff simply misapprehended the status of Docket 94-157. Either way, there was no *clerical* mistake.

Indeed, to characterize this type of mistake (assuming it was a mistake) as "clerical" is to embark on a slippery slope that ends nowhere. Every order that the Commission votes reflects characterizations and judgments by staff. Staff characterizes the positions of the parties, recites the facts, and elucidates the governing law, sometimes in very complex proceedings. And sometimes staff makes mistakes, even obvious ones. These mistakes are no different from any mistake that was made here. If, indeed, an error was made, it was a substantive error — an error

[3] As noted below, administrative agencies' authority to correct ministerial mistakes has been analogized to the authority of courts under FRCP 60(a), which provides that "[c]lerical mistakes in judgments, orders or other parts of the record" may be corrected. *See American Trucking Associations v. Frisco Transportation*, 358 U.S. 133, 79 S.Ct. 170 (1958).

[4] *Jones v. Anderson-Tully Co.,* 722 F.2d 211 (5th Cir. 1984).

in judgment or analysis by staff responsible for compiling the recommended list of proceedings to be terminated. To be sure, the error occurred in a list. But that does not transform a substantive error into a clerical one. If the list is the product of analysis, as was the case here, even erroneous analysis, the process of creating the list is substantive, not clerical.

The Commission does have broad authority to correct ministerial or clerical errors – although SBC cannot believe, as AT&T and WorldCom suggest, that this authority is boundless. But when the Commission votes an item that contains a substantive mistake by staff, the prescribed procedures for reconsideration must govern. The fact that no one, including those who now seek reinstatement, availed themselves of those procedures is not a valid reason to set them aside. Parties are entitled to rely on the judgments of the Commission, and they cannot do so if the Commission considers itself free to alter those judgments whenever they contain a mistake made by staff.

The cases cited by the Commission and relied upon by AT&T and WorldCom are of no help to their cause. *American Trucking Association v. Frisco*,[5] for example, involved an error of *transcription* that was purely ministerial in nature. More specifically, it involved the omission from a certificate of authority of language that the agency in question (the ICC) had expressly voted to include on that certificate. The staff responsible for preparing the erroneous certificate lacked the discretion to alter the vote of the ICC. Their "sole responsibility" was to "transpos[e] the Commission findings into certificate form."[6] Their omission – indeed, their very function – was thus purely ministerial. In that respect, they were fundamentally different from staff at the FCC who were given *substantive* responsibility for analyzing and determining which proceedings should be terminated. In *American Trucking* the error was purely clerical; in this case, the error, however avoidable, was analytical.

[5] *American Trucking Associations v. Frisco Transportation*, 358 U.S. 133, 79 S.Ct. 170 (1958).

[6] *Id.*

Significantly, in ruling that the ICC could correct the "inadvertent ministerial error," the Supreme Court analogized the authority vested in the ICC by virtue of section 17(3) of the Interstate Commerce Act (which is analogous to section 4(i) of the Communications Act) to FRCP 60(a). As noted, FRCP 60(a) is limited to "clerical mistakes," and stands in sharp contrast to FRCP 60(b), which covers, *inter alia,* "mistake, inadvertence, surprise, or excusable neglect." In that respect, far from supporting their claim, *American Trucking* undermines it.

Nor are any of the other cases cited by AT&T and WorldCom any more helpful to their cause. *City of Long Beach v. DOE* involved a mathematical mistake, which the courts have held constitute clerical errors under FRCP 60(a).[7] *Chicano Education v. Department of Labor* involved an omission of a liable party from the liability order. The court held the omission was clearly an inadvertent mistake, as contemplated under FRCP 60(a), because the applicable law held the party liable and the record showed that the party was a part of the proceeding from its inception.[8] *US v. Civil Aeronautics Board* involved a statute that expressly permitted the board to *issue* and *amend* its orders.[9] No analogous facts are present here. While AT&T and WorldCom cite a string of distinguishable cases, they wholly ignore the case that is most directly on point. In *Jones v. Anderson-Tully,* the Fifth Circuit held that an error by the District Court in drawing a land boundary, even though unintentional and not reflective of the record, was not covered by FRCP 60(a). The Court stated: "Although Rule 60(a) clerical mistakes need not be made by the clerk, they must be in the nature of recitation of amanuensis mistakes that a clerk might make. They are not errors of substantive judgment."[10]

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[7] *City of Long Beach v. Department of Energy*, 754 F.2d 379 (Temp.Emer.Ct. 1985).

[8] *Chicano Education and Manpower Services v. U.S. Department of Labor*, 909 F.2d 1320 (9th Cir. 1990).

[9] *United States v. Civil Aeronautics Board*, 510 F.2d 769 (D.C.Cir. 1975). Importantly, the court analogized the factual errors to those contemplated under FRCP 60(b) and held that such errors can only be corrected "within the prescribed time limits."

[10] *Jones v. Anderson-Tully*, 722 F.2d 211 (5th Cir. 1984).

In numerous other cases the courts have circumscribed the authority of agencies to correct substantive errors outside of the applicable statute of limitations. The D.C. Circuit in *Greater Boston Television Corp. v. FCC*, for example, refused to permit the Commission to reconsider a grant of a construction permit to a television broadcaster. The court held that there is a strong public policy in favor of administrative finality and [w]here no appeal has been taken Congress has declared the interest of administrative finality prevails over the flexibility, and possibly better choice, that may accompany a latitude for administrative recall." In *American Methyl Corp. v. EPA*, the D.C. Circuit iterated that, "agencies have an inherent power to correct their mistakes by reconsidering their decisions" so long as they do so "within the period available for taking an appeal."[11] Likewise in *Albertson v. FCC*, the D.C. Circuit concluded, "[t]he power to reconsider is inherent in the power to decide" and the Commission may reconsider a decision if its acts "within the period for taking an appeal."[12]

The Commission certainly had the authority, under its rules, to set aside the *Termination Order* if it was erroneous. Specifically, Section 1.108 states, "[t]he Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action…" The Commission, however, did not act within the 30-day timeframe. Rather, the Bureau reinstated Docket 94-157 more than a *year* after issuance of the *Termination Order*, an act that clearly contravenes the Commission's procedural rules. Even more egregious, the Bureau's action occurred *seven* years after it should have concluded the 1996 tariff investigation, as required under Section 204(a)(2)(A) of the Act. If termination of Docket 94-157 was an error, the Bureau missed the boat and cannot now, on its own motion, reinstate Docket 94-157.

[11] *American Methyl Corp. v. EPA,* 749 F.2d 826, 835 (D.C. Cir. 1984). The D.C. Circuit considered whether the EPA could revoke waiver to market a new methyl-gasoline blend. The Court concluded that the EPA could not do so because it failed to comply with the substantive and procedural requirements set forth in the Clean Air Act.

[12] *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950).

Nor are AT&T and WorldCom victims of any error the Commission made. They could have filed a timely reconsideration or appeal of the *Termination Order* pursuant to Section 405 of the Act and 28 U.S.C. §2344.[13] They neglected to do so, however. As the courts have held,[14] once the period for appeal has expired, a party is precluded from challenging the validity of an agency action. The 60-day window for judicial appeal ended on March 12, 2002. Accordingly, AT&T and WorldCom, like the Commission, have forfeited their right to seek reconsideration. The *Termination Order* is thus a final,[15] non-appealable order, upon which SBC rightfully could rely.

[13] 28 U.S.C. § 2344 ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.").

[14] *Petrotech Trading Co. and David L. Hooper v. US*, 985 F.2d 1072 (1993) ("…a defendant in a government enforcement proceeding may be precluded by the applicable statute of limitations from challenging the validity of the agency's action.") (citations omitted); *see Jeffrey M. Boswell v. Department of the Treasury*, 979 F. Supp. 458 (1977).

[15] 47 C.F.R. § 1.103(b). The rule states, "Notwithstanding . . ., Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or judicial review, on the date of public notice…")

CONCLUSION

For the foregoing reasons, the Bureau should set aside the *Reinstatement Notice.*

Respectfully Submitted,

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April 14, 2003